

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.)	
)	Case No. 4:05-cv-00329-GKF-PJC
)	
Plaintiffs,)	
)	DEFENDANTS' REPLY IN SUPPORT
vs.)	OF MOTION TO MODIFY MAY 8, 2009
)	SCHEDULING ORDER (Dkt. No. 2026)
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

The undersigned Defendants respectfully offer the following reply to Plaintiffs' brief opposing Defendants' Motion to Modify the May 8, 2009 Scheduling Order. Defendants seek a brief extension of the deadline for filing Daubert challenges to Plaintiffs' "ability to pay" expert (Payne) report and their natural resource damages (Stratus) reports. Despite substantial due diligence, Defendants are unable to meet the current, May 18, 2009 Daubert motion deadline for the Payne report and the Stratus report (if that is indeed the deadline for any Stratus Daubert challenge). There is good cause for the brief extension and no prejudice would result to Plaintiffs or to the Court. Thus, Defendants urge the Court to set the deadline for filing Daubert motions concerning the Payne and Stratus reports at June 19, 2009.

A. Defendants Need the Final Deposition Transcripts to Bring Any Daubert Challenges.

In their response, Plaintiffs do not dispute that David Payne issued separate expert reports unique to each Defendant group, and that his deposition regarding these several reports took

place on April 27 and 28, 2009.¹ Plaintiffs do not dispute that Defendants have not yet received the final transcript of Payne's deposition, nor that Defendants must carefully review the transcript when received in order to designate necessary portions as "attorneys' eyes only" under the Protective Order before the transcript may be widely released due to the sensitive and highly confidential private companies' financial information involved. (See Dkt. No. 2040 at 2.)

Plaintiffs also do not dispute that the deposition of five of the seven expert authors of the Stratus report took place at the very end of April and the beginning of May. The last Stratus deposition occurred on May 5, 2009, and involved Dr. Michael Hanemann, whom Defendants now believe is one of the lead Stratus experts. Plaintiffs do not dispute that Defendants have not yet received the final deposition transcripts for Stratus authors Edward Morey, Richard Bishop, Jon Krosnick, and Michael Hanemann. (See id. at 5, n.3.)²

While each of Plaintiffs' experts played some key role in the Stratus reports, the significance of Dr. Hanemann to the natural resource damages reports cannot be understated. In their own words as revealed in their Court-mandated expert disclosures, Plaintiffs describe the significant hand that Dr. Hanemann had in authoring and generating the opinions in six of the seven or eighty-five percent of the chapters and one of the key appendices of the Stratus future-damages report. (See Dkt. No. 1980-3 at Ex. 1.) Plaintiffs revealed that Dr. Hanemann may

¹ In addition, Payne delivered supplemental reports on April 14, 2009 and expressed his intent at his deposition to file even more reports later. (See, e.g., Dkt. No. 1992.)

² Defendants received the rough transcript of Dr. Hanemann's deposition on May 11, 2009 and have commenced reviewing the transcript. Plaintiffs suggest in their response brief that rough transcripts are adequate for preparing a Daubert motion. Without going into great detail, Defendants' experience has been there is a very real difference, not unusually even in substance, between rough transcripts – which are assembled extremely quickly and without the normal quality control procedures – and final transcripts that have such controls in place. And it makes little sense to direct the Court's attention to pagination based on rough transcripts that may contain inaccurate statements.

testify to (1) the overall study design, approaches to natural resource damages, total valuation framework, and contingent valuation measures of damages and validity of results; (2) determination, measures and measurement of economic value; (3) compliance with NOAA panel guidelines and consequentiality; (4) overall survey scenario description, survey bid design, and development of voting question format; (5) construct validity and sensitivity analysis and econometrics; (6) estimate of the average value per household in Oklahoma for the continuing injuries to the Illinois River system and Lake Tenkiller and aggregation of household damages to the public of the State; and (7) sensitivity analysis of mean willingness to pay, including such topics as uncertainty, scenario acceptance and certainty, interviewer assessment of understanding of tradeoff, and willingness-to-pay estimates. Further, Dr. Hanemann was one of the three authors of Plaintiffs' past-damages expert report, and Plaintiffs have stated that they may call Dr. Hanemann to testify regarding past damages. (Id.)

As a result of the outstanding final deposition transcripts and the significant resources that Defendants have devoted to preparing for the damages related depositions, Defendants have not been able to formulate, much less "complete," the "lion's share" of the Daubert analysis necessary for the Stratus reports, as Plaintiffs incorrectly charge. (See Dkt. No. 2040 at 2.) Given the late date of Dr. Hanemann's deposition (May 5) and his significance to the Stratus opinions and damages figure, Defendants submit that a brief and circumscribed extension of the Daubert motion deadline is warranted.

Defendants have good faith bases to bring Daubert motions challenging Plaintiffs' damages reports. The simple truth is that the final deposition transcripts are critical to Defendants' motions, as these transcripts will prove indispensable in supplying the Court with specific, accurate statements of Plaintiffs' damages' experts as they explicate their own reports

under informed examination.

This Court should clarify whether Daubert challenges to the Stratus report are due on June 19, 2009 under this Court's current schedule, and if not, should grant Defendants a limited extension until that date so that they may at least have an opportunity to consider all of the experts' final deposition transcripts before filing a Daubert motion. Likewise, the Court should grant the limited extension for a Daubert motion regarding Mr. Payne. Despite diligence, Defendants simply cannot meet the May 18, 2009 deadline for these Daubert motions. For these reasons and because these extensions would not prejudice Plaintiffs or disrupt this Court's pretrial schedule, the Court should grant Defendants' motion.

B. Defendants Have Diligently Pursued the Information Necessary to Bring Their Daubert Motions.

Although not directly pertinent to the merits of the motion for extension, Defendants must clarify the record regarding the parties' disputes over the Stratus expert disclosures. Plaintiffs' response set forth a litany of Defendants' alleged "procedural games to delay the depositions of the State's contingent valuation experts," a list that mischaracterizes a complex and subtle record and that is unhelpful to resolving the present logistical dilemma facing Defendants. (Id. at 3.)

Due to Plaintiffs' failure to fully comply with the Federal Rules, Defendants filed good faith motions directed at securing complete disclosures regarding Plaintiffs' Stratus reports and opinions, which reports serve as the primary basis for Plaintiffs' damages claims of more than half a billion dollars. Defendants moved after a lengthy (but not dilatory) meet and confer process intended to resolve the matter without Court intervention. (See Dkt. No. 1938 at 3-7.) When it became necessary to involve the Court, after a deliberate and thoughtful process, the Court on April 14, 2009 granted Defendants' motion and required Plaintiffs to provide additional

expert disclosures regarding the roles of the Stratus authors in forming the opinions expressed in the Stratus reports. (See Dkt. No. 1979 at 1-2.)

The Court suspended further depositions until those disclosures were provided to Defendants. (Id. at 2.) Once the disclosures were provided, Defendants worked diligently with Plaintiffs to quickly schedule the depositions of the Stratus experts, which proved difficult given the experts' limited availability. Plaintiffs provided their disclosures on the evening of Friday, April 10, 2009. (See Dkt. No. 1980 at 2.) By early morning Sunday, April 12, 2009, Defendants engaged Plaintiffs in the first of a series of email exchanges in an effort to schedule all of the remaining damages experts by May 1, 2009, as ordered by the Court. (Id.) Plaintiffs offered April 28 – May 1, 2009 and May 5, 2009 as deposition dates for the five Stratus experts not yet deposed. (Id.) Defendants accepted those dates, took the depositions in the order Plaintiffs demanded, and sought leave of the Court to take the May 5, 2009, deposition of Dr. Hanemann. (Id.) The entire process from disclosure to final deposition schedule – including briefing and securing the Court's Order allowing the May 5 Hanemann deposition – was completed by April 16, 2009, merely six days after Plaintiffs' disclosures. (Id.; Dkt. No. 1982.)

This record belies Plaintiffs' bald assertion that “[t]he delays Defendants have experienced in completing their discovery of the State's contingent valuation experts are ones of their own making” and stem from “procedural games.” (Dkt. No. 2040 at 3.) Defendants find nothing entertaining or game-like about facing more than a half billion dollars in damages claims and have pursued their right to defend against these claims as diligently and expeditiously as possible given the complex and frequently moving parts of the case.

Indeed, in an effort to accommodate the Stratus experts, Defendants, at the risk of prejudice to themselves, took the depositions of four key Stratus experts (in the order offered by

Plaintiffs) on four back-to-back days, April 28 – May 1 (see Dkt. No. 2027 at 2-3), which proved to be a significant undertaking. Each expert deposition built upon the last, required immense preparation, including sifting through and organizing voluminous considered materials, and required coordination and consultation with Defendants’ own experts to ensure the questions asked effectively probed the validity and reliability of the reports at issue.³ Defendants strongly believe the results of these depositions will aid the Court in performing its Daubert-mandated gatekeeping role but need a short extension to analyze the deposition transcripts which have only recently been received and those transcripts which Defendants anticipate will be received within a couple of weeks.

CONCLUSION

For the reasons set forth above, the Court should allow the requested, limited modification of the pretrial schedule.

³ In this last regard, Defendants’ damages experts, whose participation in analyzing Plaintiffs’ expert reports and deposition transcripts is critical, are themselves sitting for depositions taken by Plaintiffs on May 13 and May 14. Thus, they have been preparing for their depositions this week and are unavailable to review the few final deposition transcripts Defendants have received until next week at the very earliest.

Dated: May 13, 2009

Respectfully submitted,

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